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NO. 91-1269

In The

Supreme Court Of The United States

OCTOBER TERM, 1991

U.S. METROLINE SERVICES, INC.
Petitioner,

vs

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONSE TO ISSUES PRESENTED

1. The Fifth Circuit did not err in affirming that Respondent's actions were immune from liability pursuant to the state action doctrine articulated in *Parker v. Brown.*

2. The decision below granted limited immunity and that holding is appropriate under prevailing precedents applied to the regulatory structure in Texas.

3. There is no conflict between the decision below and the decisions of other Courts of Appeal and of this Court.

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RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

A Writ of Certiorari is not appropriate in this case. The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") did not err in holding Southwestern Bell was immune from antitrust liability under the circumstances of this case, relying upon *Parker v. Brown*, 317 U.S. 341 (1943). The Fifth Circuit determined immunity was appropriate in the first appeal wherein Petitioner sought a reversal of the denial of injunctive relief. The issue of immunity was fully briefed by both parties prior to that decision.

When the same liability was reasserted by Petitioner following the lower court's grant of Southwestern Bell's 12(b)(6) Motion to Dismiss, the Fifth Circuit correctly applied law of the case on the immunity issue to that second appeal. As the Fifth Circuit held in the first appeal, Southwestern Bell clearly meets the two-prong test set out in *California Retail Dealer's Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Texas has a pervasive regulatory system governing Southwestern Bell's actions as a regulated utility, and the state actively supervises Southwestern Bell's conduct under the auspices of its agency, The Public Utility Commission of Texas ("Commission").

The services at issue in this dispute are the network connections that are the focus of regulation in Texas, not a minor side business on the fringe of regulation as was the light bulb exchange program in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976).

Southwestern Bell sought to terminate Petitioner's misuse and resale of its local exchange services to provide Petitioner's interexchange service because both the use and the resale violate applicable tariffs approved by the Public Utility Commission of Texas. Interexchange carriers like Petitioner are required to order services from Southwestern Bell's Access Service Tariff, and pay a higher rate, as approved by the Commission following contested hearings and as ultimately approved by the Texas Supreme Court upon review. There is no resale prohibition in the Access Service Tariff. Ordering from the Access Service Tariff was Petitioner's alternative to termination.

Allowing Petitioner to misuse local exchange services at a low rate while enforcing the prohibition against other interexchange carriers creates an unreasonable discrimination prohibited by the Public Utility Regulatory Act,

Tex. Rev. Civ. Stat. Ann. art. 1446(c) (Vernon's Supp. 1989) ("PURA"). Given the extensive regulation of Southwestern Bell's provision of the services at issue in this dispute, *Parker v. Brown* immunity is appropriate and the Writ of Certiorari should be denied.

STATEMENT OF THE CASE

Southwestern Bell Telephone Company[1] ("Southwestern Bell") provides telecommunications services in the state of Texas pursuant to a certificate of convenience and necessity issued by the Public Utility Commission of Texas ("Commission").

U.S. Metroline Services, Inc. ("USM") and Southwestern Bell each offer a form of flat-rate calling between the Dallas and Ft. Worth exchanges. Southwestern Bell's tariffed service is called "Extended Metropolitan Service" or "EMS". For an additional monthly charge for the optional EMS service, Southwestern Bell customers can enjoy the expanded calling scope of the two exchanges without incurring usage-sensitive long distance charges.

The EMS service offered by Southwestern Bell which provides for the calling scope of Dallas and Ft. Worth is available only to customers who reside in the area abutting the two exchanges. If residents of Dallas or Ft. Worth are not located in this discrete area but want EMS service from Southwestern Bell, they must, (pursuant to tariff), pay a mileage fee to connect their premises with the nearest

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[1]Please see Appendix of Petitioner, Section I for the listing of parent companies and subsidiaries of Southwestern Bell pursuant to Rule 29.1.

Southwestern Bell central office which provides EMS service, in addition to the Commission-approved EMS rate.[2]

USM offers a service at a flat-rate to residents of Dallas and Ft. Worth in lieu of their customers paying long distance charges. Based on the way USM has arranged their network, their customers do not incur a mileage charge. Southwestern Bell complains of the improper use USM is making of Southwestern Bell's tarriffed services in order to provide its substitute for long distance service, which they refer to as "metro service".

Southwestern Bell confirmed the use being made of its services when it conducted an audit of USM in late 1988-1989. The audit was a routine procedure by the Tariff Adherence Group ("TAG") who were charged with ensuring that Southwestern Bell's services were being used in conformance with the tariffs under which it operates. This is a crucial determination since Southwestern Bell cannot, under PURA Sec. 45, discriminate in the provision of its services. Southwestern Bell must, therefore, ensure its customers are not providing a service through the inappropriate use of lower-rated Southwestern Bell services, while other customers provide a similar service through the appropriate use of higher-rated Southwestern Bell services.

As a result of the audit, Southwestern Bell discovered USM was "reselling" local exchange services it procured from Southwestern Bell in order to provide its outbound interexchange service, in violation of the prohibition against

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[2]The Commission approved Southwestern Bell's tariffs under which it provides these services as an optional form of local exchange service; the Commission has never recognized "a third category of service" as characterized by USM on page 2 of its petition.

resale contained in Southwestern Bell's General Exchange Tariff.[3] Interexchange services are available to interexchange carriers like USM and must be procured from the Access Service Tariff where there is no prohibition against resale. Because the tariffed Access Service rates are higher than the tariffed rates of local exchange services, and because services provided under the Access Service tariff can be resold, TAG audits were conducted to ensure services were procured from the appropriate tariffs. On March 9, 1989, Southwestern Bell wrote a letter to USM informing it of its misuse of Southwestern Bell's services. After several fruitless discussions, Southwestern Bell ultimately sent USM a termination notice, stating it would terminate service on July 11, 1989. Southwestern Bell would have continued to provide service if USM secured its services from the Access Service tariff, as appropriate for every interexchange carrier.

In order to understand how USM instituted its service, it is necessary to go back to 1982 when an entity known as DFW Communications procured services from Southwestern Bell by way of Greg Cunningham, it founder. (Appendix, 2c) DFW Communications was a licensed radio common carrier (RCC) which entitled it to certain circuits limited by contract to RCC's and to RCC-DID numbers and trunk terminations under Southwestern Bell's applicable tariffs. *(Id.)* These RCC services are provided at rates lower than even "regular" business local exchange services, are of limited availability and are to be used *only* in providing paging and two-way mobile service. DFW Communications was in the paging business.

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[3]The General Exchange Tariff containing the resale prohibition applies to all local exchange customers. There is no "resale prohibition tariff" as stated on page 3 of the Petition.

Mr. Cunningham became the technical adviser, manager and developer of DFW Metro Line Services, a partnership, while still operating DFW Communications. While this new entity (now incorporated and known as USM) provided the metro-like service, Southwestern Bell originally believed the services were being used to provide paging services as an RCC. *(Id.)* Mr. Cunningham continued to place orders for additional Southwestern Bell services for what Southwestern Bell believed to be DFW Communications, and the accounts were originally billed in the name of DFW Communications.

In fact, DFW Metro Line (now USM) was never an RCC, never provided paging services and was, therefore, *never* entitled to the use of RCC services to provide its inbound calling. The misuse of these inbound services was additional grounds for termination. The audit confirmed this misuse and that USM was providing an interexchange service via resale of local exchange service and thus the termination process was initiated.

The Commission determines the appropriate rates to be charged by a utility based in part upon the use to be made of that service. (e.g., "business" vs. "residential" rates). This use also determines whether the service being provided is within the parameters found appropriate by the Commission pursuant to its approval of Southwestern Bell's tariffs.

Petitioner filed suit in federal district court seeking injunctive relief, claiming the impending termination was a violation of the antitrust laws. Petitioner's injunctive relief was denied. Petitioner appealed that denial and the decision by the lower court was affirmed by the United States Court of Appeals for the Fifth Circuit, *DFW Metroline, Inc. v. Southwestern Bell Telephone Co.*, 901 F.2d 1267, 1269 fn.6 (5th Cir. 1990), cert. den. ____ U.S. ____,

111 S.Ct. 519 (1990), holding *inter alia* that Southwestern Bell was immune from the antitrust liability alleged by DFW pursuant to the "state action" doctrine enunciated in *Parker v. Brown,* 317 U.S. 341 (1943).

Subsequently, the district court granted Southwestern Bell's Fed. R. Civ. Pro. 12(b) (6) Motion to Dismiss relying in part upon the Fifth Circuit's holding cited above. Petitioner appealed, and again, the Fifth Circuit affirmed the lower court in a *per curiam* opinion. In so holding, the Fifth Circuit acknowledged that "Bell is immune from the antitrust liability alleged" as established by the law of this case. The Court determined: "Since the same liability is now reasserted, Bell is immune from liability here". (Appendix, Section A, p. 4-a). This petition followed.

ARGUMENT

The Fifth Circuit did not err in applying *Parker v. Brown* immunity to the actions of the Respondent in its initial opinion in this case, and further appeal of that initial decision was exhausted when this court denied certiorari in 1990.

Petitioner later asserted the same liability against Respondent even though the Fifth Circuit had already held Respondent's actions were immune from liability; therefore, the application of "law of the case" to the immunity issue on the second appeal was appropriate.

Petitioner's argument concerning the relative size of the parties, not only incorporates information that is outside the record of this case, but is also inapposite to the issues presented for review. Whether Respondent's actions at issue in this case are immune from antitrust liability due to the fact it acted pursuant to a pervasive regulatory scheme

effectuated by the State of Texas is not predicated upon the perceived financial strength of the parties.

The Fifth Circuit did not grant Respondent a limitless cloak of immunity, as Petitioner seems to allude. Rather, the Court recognized Respondent was acting in these circumstances as a regulated utility, pursuant to the auspices of a pervasive statutory regulatory scheme in Texas. The statutory framework is set forth in the Public Utility Regulatory Act ("PURA"), Tex. Rev. Civ. Stat. Ann. art. 1446(c) (Vernon Supp. 1989), under the purview of the Public Utility Commission of Texas.

1. THE FIFTH CIRCUIT DID NOT ERR IN AFFIRMING RESPONDENT'S ACTIONS WERE IMMUNE FROM LIABILITY PURSUANT TO THE STATE ACTION DOCTRINE ARTICULATED IN *PARKER V. BROWN.*

Petitioner incorrectly characterizes the Fifth Circuit's holding in the first appeal that Respondent's actions are immune from liability as "dicta". The court specifically stated:

> As an *additional basis for our holding,* we *find* that Southwestern Bell is immune from the antitrust liability alleged in DFW's complaint under the "state action" doctrine enunciated in *Parker v. Brown,* 317 U.S. 341, 63 S. Ct. 307, 87 L.Ed. 315 (1943), as applied to private state-regulated ratemaking by *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48, 105 S. Ct. 1721, 85 L.Ed. 2d 36 (1985). Southwestern Bell clearly meets the two-prong test set out in *California Retail Dealer's Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S. Ct. 937, 63 L.Ed. 2d 233 (1980). There is no, therefore, likelihood of success on the merits in the instant case. (emphasis added)

By focusing on the "law of the case" language in the Fifth Circuit's decision in the appeal, Petitioner ignores the fact that the Court applied "law of the case" *because* the same liability was being asserted against the *same* party, therefore, the *same* immunity applied. Under any standard of review, this holding was appropriate. Petitioner's case against Respondent was barred *ab initio* due to *Parker v. Brown* immunity, as apparent on the face of the complaint. Therefore, at every stage of the proceedings it was appropriate for the lower court and the Fifth Circuit, both, to uphold that bar.

There is no conflict between the Fifth Circuit's decision in this case and the cases referenced by Petitioner on pages 7-9 of its Petition. Petitioner fails to distinguish between a mere procedural holding in a preliminary proceeding, such as a general failure to show irreparable injury entitling a party to immediate injunctive relief, from a fatal flaw in a cause of action that nullifies the party's ability to proceed on the merits, such as immunity. Immunity is one of the limited number of defenses upon which dismissal by 12(b) (6) motion is appropriate. See *McQueen v. Bullock*, 907 F.2d 1544, 1550-51 (5th Cir. 1990), *cert. den.* ____ U.S. ____, 111 S.Ct. 1308 (1991).

To apply Petitioner's reasoning to a different set of facts would support, for example, proceeding to the merits on a claim absolutely barred by the applicable statute of limitations after that bar was first recognized in a decision on a preliminary matter. Such a result is anathematic to judicial economy and is not mandated by the law.

Petitioner cites *Scott v. Kuhlmann*, 746 F.2d 1377 (9th Cir. 1984) for the proposition that an affirmative defense (such as immunity) may not ordinarily be raised by a motion to

dismiss. In that case, *res judicata* was the affirmative defense asserted in a case dismissed by the trial court. The Ninth Circuit held that when the defense raises no disputed issues of fact, raising the defense in a motion to dismiss is appropriate. (*Id.* at 1378). In a later case, the same circuit upheld a claim of immunity by Guam in a dismissal of the action by summary judgment. *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285 (9th Cir. 1985), *cert. den.*, 475 U.S. 1081 (1986).

Petitioner asserts the Fifth Circuit's decision regarding "law of the case" conflicts with *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703 (9th Cir. 1990), when in fact that case supports the Fifth Circuit's decision. In *Milgard*, law of the case was inapplicable because neither the lower court nor the Ninth Circuit in the first appeal discussed the issue of attorney's fees. Therefore, law of the case did not apply in the second appeal as to the attorney fee issue. The *Milgard* opinion discussed law of the case application, noting:

> For the doctrine to apply the issue in question must have been "decided explicitly or by necessary implication in [the] previous disposition. (*Id.* at page 715, cites omitted).

In the present case, the immunity issue was thoroughly briefed and explicitly determined at the first appeal.

There is also no conflict with *Liffton v. Keuker*, 850 F.2d 73 (2d Cir. 1988), cited by Petitioner. In that civil rights case, the sovereign immunity defense was called into question. The Second Circuit upheld the dismissal of claims against the state, Supreme Court Justice Kasler, one Assistant Deputy Attorney General, the county and the Internal Revenue Service. As to another Assistant Deputy Attorney

General, the court found the complaint raised allegations entitling him only to qualified immunity, which does not ordinarily support a 12(b) (6) dismissal. Nothing in *Liffton* conflicts with a decision by a court construing a complaint that does *not* raise an issue that cannot be overcome by the defense of immunity.

The opinion in *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), *cert. den.*, 479 U.S. 1103 (1986) does not support the argument for which it is cited by Petitioner, and in fact does not even *mention* the tests applicable to a preliminary injunction and Rule 12(b) (6) motion to dismiss.

On page 9 of its Petition, Petitioner confuses the fact that various courts have held the stay of a preliminary injunction does not automatically establish the law of the case, with the Fifth Circuit's decision in the present case concerning the applicability of the immunity defense to the circumstances. In *The Board of Trade of the City of Chicago v. Commodity Futures Trading Commission*, 605 F.2d 1016 (7th Cir. 1979), *cert. den.*, 466 U.S. 928 (1980), the court would not apply law of the case when its only action in the first appeal was to deny a motion to stay that was raised in an emergency motion for a stay pending appeal.

Similarly, in *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986), *cert. den.* 484 U.S. 870 (1987), the Ninth Circuit only stated the "general rule" regarding preliminary injunction not constituting law of the case, then held its "independent consideration" of the issues led it to approve the conclusions in the first appeal. There is nothing in the record of this case to suggest the Fifth Circuit did not engage in an "independent consideration" in finding Respondent was immune from a reassertion of the same liability, while applying law of the case.

Finally, *Sierra Club v. U.S. Army Corp of Engineers,* 771 F.2d 409 (8th Cir. 1985) stands for the proposition that findings of fact and conclusions of law made by a court in granting or denying a preliminary injunction are not binding at the trial on the merits. This holding is inapposite to the issues in the present case.

Neither is there conflict with this Court's opinion in *University of Texas v. Camenisch,* 451 U.S. 390 (1981). That case involved the question of whether a preliminary injunction should have been moot since the terms of the injunction have been fully carried out when the university hired an interpreter for a deaf student. This Court found the injunction question was moot, but the question of whether the university must pay for the interpreter remained for trial on the merits. There is no parallel with the present case in *Camenisch.* After the Fifth Circuit affirmed the denial of preliminary relief, the case went back to the trial court. The Petitioner's complaint was disposed of by the District Court, without trial, by granting Respondent's Motion to Dismiss. That dismissal was affirmed in the second appeal. Therefore, no unresolved issue remained to be determined as in *Camenisch.* There is also no issue of mootness in the present dispute.

2. THE DECISION BELOW GRANTED LIMITED IMMUNITY AND THAT HOLDING IS APPROPRIATE UNDER PREVAILING PRECEDENTS APPLIED TO THE REGULATORY STRUCTURE IN TEXAS.

There is no dispute that the Sherman Act is not subject to the "permission or approval" of the state of Texas, as asserted by Petitioner on page 10 of its petition. What Petitioner fails to recognize is that this Court has long ago

resolved any conflict between the states and the federal antitrust laws in *Parker v. Brown*, 317 U.S. 341 (1943), holding:

> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.

While Petitioner paraphrases the purpose clause of PURA, Section 2, on page 10 of its Petition, the language of that clause is unequivocal when read in context and in its entirety:

> This Act is enacted to protect the Public interest inherent in the rates and services of public utilities. The legislature finds that public utilities are by definition monopolies in the areas they serve; that therefore the normal forces of competition which operate to regulate prices in the free enterprise society do not operate; and that therefore utility rates, operations and services are regulated by public agencies, *with the objective that such regulation shall operate as a substitute for such competition.* The purpose of this Act is to establish a comprehensive regulatory system which is adequate to the task of regulating public utilities as defined by this Act, to assure rates, operations, and services which are just and reasonable to the consumers and to the utilities. (emphasis added). (Appendix at 55h)

Petitioner misapplies the quote in footnote 6 of its Petition to the facts in this case. In that quote, the Commission was referring to *new technologies.* There are no new technologies at issue in this case. What is at issue is Petitioner's misuse of fundamental, basic local exchange services secured from Respondent in order to provide an interexchange flat rate calling scheme that it believes to be competitive with a longstanding flat-rate calling plan that Respondent has offered in Texas since the late sixties, well

before PURA was passed in 1976, and the Commission was established.

There is no "giving way" to technology in the present scenario. In an even earlier order, Docket 5113, in conclusion of law number 31, the Commission found:

> The Commission can reasonably elect to implement a plan which preserves universal service in a manner which causes the least customer impact and can reasonably conclude that preserving universal service for several million local ratepayers must take priority over the protection of the competitive enterprises of the relatively few interexchange customers.

The present dispute is not a refusal by Respondent to permit Petitioner to interconnect with Respondent's services. This dispute can be reduced to an unwillingness of Petitioner to pay the appropriate tariffed rate for the use of Southwestern Bell's services necessary for Petitioner to provide its own service. Petitioner wants to rewrite Southwestern Bell's tariffs to accommodate its idea of how it wants to use Southwestern Bell's services, regardless of how other providers are limited in use, and to decide unilaterally what rate it wants to pay for that use.

Southwestern Bell's actions in this factual circumstance are protected by the state action doctrine, because the enforcement of its Commission-approved tariffs is conduct that is clearly articulated and affirmatively expressed as state policy, under PURA, and the state actively supervises such conduct through the Commission, an agency of the state created by the Texas Legislature.

Southwestern Bell's obligation to enforce its tariffs as they apply to Petitioner or any other similarly situated customer and to charge the appropriate tariffed rate for a

service is clearly aritculated and affirmatively expressed as state policy, (PURA, §§2, 46), and the state actively supervises such conduct so as to remove it from scrutiny under the antitrust laws. (PURA §83). Thus, the Fifth Circuit held that Southwestern Bell's actions in this case are exempt from the antitrust laws under the state action doctrine. The United States Supreme Court's landmark decision applying *Parker v. Brown*, 317 U.S. 341 (1943) to private collective ratemaking activity leaves no question that this petition must be denied because of the state action doctrine. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985); see also *Woolen v. Surtran Taxicabs, Inc.*, 801 F.2d 159, 163-64 (5th Cir. 1986), *cert. den.*, 480 U.S. 931 (1987).

This Court's two-pronged test for determining whether state regulation of private parties is shielded from the federal antitrust laws provides: (1) the challenged restraint must be clearly articulated and affirmatively expressed as state policy; (2) the state must actively supervise any anticompetitive conduct. *Southern Motor Carriers*, 471 U.S. at 57; *Midcal*, 445 U.S. at 97; *see also Woolen v. Surtran Taxicabs, Inc.*, 801 F.2d at 163-64. This court in *Southern Motor Carriers* rejected the notion that the state had to *compel* the questioned anticompetitive conduct in order to have clearly articulated and affirmatively expressed its policy. *Southern Motor Carriers*, 471 U.S. at 60. This Court held that "[T]he federal antitrust laws do not forbid the States to adopt policies that permit, but do not compel, anticompetitive conduct by *regulated* private parties." *Id.* at 60 (emphasis in original); *see also Sonitrol v. American Telephone & Telegraph Co.*, 629 F. Supp. 1089, 1094-95 (D.D.C. 1986). This court in *Southern Motor Carriers* also held:

> A private party acting pursuant to an anticompetitive regulatory program need not "point to a specific,

> detailed legislative authorization" for its challenged conduct. [citation omitted] *As long as the state as sovereign clearly intends to displace competition in a particular field with a regulatory structure,* the first prong of the *Midcal* test is satisfied.

Southern Motor Carriers, 471 U.S. at 63 (emphasis added); *see also Sonitrol,* 629 F. Supp. at 1094-95.

Even before *Southern Motor Carriers,* the Fifth Circuit confronted the question of application of the state action defense to antitrust claims very similar to those in this case. In *Jeffrey v. Southwestern Bell,* 518 F.2d 1129 (5th Cir. 1975), residential telephone subscribers in Dallas, Texas brought an action to challenge certain allegedly anticompetitive practices of Southwestern Bell. The Fifth Circuit held that there is no function more particularly "sovereign" than the implementation of rates and regulations on a public utility. (*Id* at 1133). Thus, activities commanded by governmental bodies are exempt from antitrust attack. *(Id.)* (citing *Alabama Power Co. v. Alabama Electric Cooperative, Inc.,* 394 F.2d 672 (5th Cir. 1968), *cert. denied,* 393 U.S. 488 (1968). The Court also stated in *Gas Light Co. of Columbus v. Georgia Power Co.,* 440 F.2d 1135, 1140 (9th Cir. 1971) *cert. den.,* 404 U.S. 1062 (1972) that the *Parker* exclusion applies to the rates and practices of public utilities enjoying monopoly status under state policy when their rates and practices are subject to meaningful regulation and supervision by the state so that they are the result of the considered judgment of the state regulatory authority. Regulation by a governmental body of the rates and practices of a public utility is a classic example of the *Parker v. Brown* exemption. (*Jeffrey,* 518 F.2d at 1134).

Petitioner's complaint is that Southwestern Bell is attempting to enforce its tariff rates against Petitioner for

use of Southwestern Bell's services in its metro-like business. USM contends that such tariff rates are self-serving and exclude competition by attacking the rate structure set out by the Commission and is requesting the tariffs be applied in a discriminatory manner. However, the Commission is authorized by statute to approve the tariffs which are found to be in the public interest even if those tariffs work a disadvantage to a category of customers.

A. *Texas Clearly Articulates and Affirmatively Expresses Southwestern Bell's Conduct as State Policy.* (First Prong of *Midcal*).

As the Fifth Circuit stated in the first appeal, the first prong of the *Midcal* test is plainly satisfied in the instant case. Texas has clearly articulated a policy to regulate telephone rates.[4] The Public Utility Regulatory Act ("PURA"), Tex. Rev. Civ. Stat. Ann. art. 1446c (Vernon Supp. 1989), is devoted to the regulation of ratemaking and other practices of public utilities, (such as Respondent), and specifically displaces federal antitrust laws, as Section 2 provides.

It is the policy of the State of Texas to protect the public interest in having adequate and efficient telecommunications service available to all citizens of the state at just, fair and reasonable rates and to promote competitiveness. PURA §13(a). Thus, the Commission is given exclusive original jurisdiction over the business and property of telecommunications utilities in the State of Texas. PURA §18(b). Southwestern Bell, like other telecommunications common carriers, is required to file proposed tariffs describing all rates, rate structure, regulations and rules before a service

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[4]The term "rate" as used in PURA includes any rules, regulations, practices, or contracts affecting any compensation, tariff, charge, fare, toll, rental. PURA §3(d) (Appendix, at 58h).

can be offered to the public. PURA §32. The Commission has the responsibility to review such rates, regulations, rules, and standards for such services when they are filed and to allow them to become effective only if they are just, fair and reasonable and comply with the public interest standard of the PURA. PURA §§18, 35, 37, 38; *DFW Metro Line Services* 901 F.2d at 1268, n.4. Interested parties are given notice of rate changes and proposed services and may intervene in the proceedings before the Commission. PURA, §§32, 38; and PUC Substantive Rules.

If the Commission is doubtful in regard to reasonableness of rates, it has the power and duty to conduct an investigation, and if it comes to the conclusion that a tariff is not in compliance with PURA, it may order the tariff canceled, or modified, as the circumstances warrant. PURA §§16(A), 37, 42, 43(f). If the tariff is acceptable, it must be fully enforced. PURA §§37, 43. A tariff has the force and effect of law. *Carter v. American Telephone & Telegraph Co.*, 365 F.2d 486 (5th Cir. 1966), *cert. den.*, 385 U.S. 1008 (1967).

PURA makes it unlawful for a public utility to charge rates other than those authorized by the tariffs. PURA §31. The PUC has the power to insure compliance with the obligations of public utilities under the PURA. PURA §37.

The Commission also has many of the powers of a court of law. Any affected person may complain to the PUC in writing, setting forth any act or thing done or omitted to be done by any public utility in violation of any tariff and may obtain a hearing. PURA §§83(a), 84. A party may complain of any anticompetitive or discriminatory practices by a public utility. PURA makes it unlawful for a public utility to grant any preference or prejudice as to its rates or services or to discriminate in the selling, leasing or performance of its services to entities in competition with the public utility.

PURA §§45-47. The Commission has the ability to grant interim relief to maintain the status quo pending the resolution of any complaint. PURA §16(a). The Commission may also call and hold hearings, administer oaths, receive evidence at hearings, issue subpoenas to compel the attendance of witnesses and the production of papers and documents and make findings of fact and decisions with respect to administering the provisions of PURA or the rules, orders or other actions of the Commission. PURA §16(a). The Commission may enjoin violation of its regulations by requesting the Attorney General to seek an injunction in the courts. PURA §§71-77. Appeals from Commission orders may be taken to the state district courts. PURA §69.

The Texas statutory scheme is clearly consistent with that reviewed by this Court in *Southern Motor Carriers.* In addition, Texas courts have explained the policy behind this regulatory structure as one of limiting competition sufficiently to guarantee stability of the public utilities, while retaining enough competition to serve consumers and avoid discrimination. *See Texas Alarm & Signal Ass'n. v. PUC,* 603 S.W. 2d 766, 772 (Tex. App.- Austin 1985, no writ) (the PUC may design rates and services that are reasonable and serve the public interest, even if somewhat discriminatory); *Amtel Communications, Inc. v. Public Utility Commission of Texas,* 687 S.W.2d 95, 99 (Tex. App. — 3rd Dist. 1985, no writ) (PURA requires that the PUC implement a public policy that the monopoly power of a public utility shall be held only under state license and regulatory control; there is also a public policy against unreasonable discrimination in utility services but, in some instances, the PUC may implement a policy that is reasonably discriminatory if based upon the public interest); *see also Public Utility Commission of Texas v. AT&T Communications, Inc.,* 777 S.W. 2d 363 (Tex. 1989).

PURA recognizes the appropriateness of classifications among customers of a regulated public utility. For instance, certain businesses that furnish service only to themselves or to tenants as an incident of tenancy, (such as hospitals, hotels and motels), but who do not resell to others, are excluded by PURA from regulation as utilities. PURA, §3(3). There is no question that Texas intends to "displace competition with a regulatory structure." *See Southern Motor Carriers*, 471 U.S. at 64-65; *see also Sonitrol*, 629 F. Supp. at 1091-92 where plaintiff alleged that AT&T manipulated tariffs and restructured pricing to prevent plaintiff from competing in the alarm services market, the court held that the cause of action was barred by the state action doctrine because the state articulated a policy to regulate telephone rates).

Petitioner's brief at page 11 cited *Public Utility Commission of Texas v. AT&T*, 777 S.W. 2d 363 (Tex. 1989) for the proposition that §§45 and 47 of PURA apply only to the utility and not to the Commission. However, the next sentence in that opinion goes on to confirm, "Section 38 of the PURA is the section that provides guidance to the Commission in designing a rate structure." (*Id.* at 367).

Petitioner has also misapplied *Southern Motor Carriers*, *Parker* and *Midcal*. USM's analysis of these cases depends upon its assertion that there is no intention by the State of Texas to "displace competition" in the telecommunications field. Again, Section 2 of PURA could not be more explicit:

> . . . the normal forces of competition which operate to regulate prices in a free enterprise society do not operate; and that therefore utility rates, operations and services are regulated by public agencies with the objective that such regulation shall operate as a substitute for competition.

The above-quoted language is found under Article 1, which states the "Legislative Policy" for the Act. This mandate was not abrogated by §18(a), rather the Commission is charged with regulating the utility by setting "just, fair and reasonable rates" and promulgating rules and policies that are appropriate in a competitive environment. It is no less state action for the Commission to carry out the public policy stated in PURA §18(a), just because competitors may be present in a given environment. This comprehensive regulatory mandate is not unlike the regulatory structure in Florida. See *Davis v. Southern Bell,* 755 F. Supp. 1532 (S.D. Fla. 1991). The *Davis* case supports Southwestern Bell's argument, as it is yet another recent example of a Court holding that the state action doctrine barred the stated claims against that telecommunications utility.

Petitioner repeatedly relies upon Section 47 of PURA for the proposition that the *entire Act* is designed to "protect competitors from the anticompetitive conduct of public utilities". USM misapplies Section 47. Under Section 47, Southwestern Bell must offer its services on a nondiscriminatory basis. Setting tariff rates for these services and holding the utility to charging these same rates to every similarly situated customer is the method by which the Commission ensures that Section 47 is enforced. This section does not relieve the Commission of its extensive regulatory mandate. Rather, it increases the scope of its purview to include an examination of discriminatory impact in its goverance of utilities. Section 47 prohibits Southwestern Bell from unreasonable discrimination in *favor* of USM (or any customer) by charging it lower local exchange rates for its use of Southwestern Bell's services to provide an interexchange service, when it cannot charge that same rate to a competing interexchange carrier.

B. *Texas Actively Supervises Southwestern Bell's Conduct.* (Second prong of *Midcal*).

As recognized by the Fifth Circuit, the second prong of the *Midcal* test, the active supervision prong, is also met under the circumstances at bar. The second prong requires that the state actively supervise its regulation of anticompetitive conduct. *Southern Motor Carriers*, 471 U.S. at 57. The Court in *Southern Motor Carriers* stated that the regulatory commissions of all four states involved in ratemaking had the ultimate authority and control over all the rates. (*Id.* at 51.) The Court of Appeals found, and the government conceded, that this amounted to active supervision. (*Id.* at 62.)

Like the regulatory commissions in *Southern Motor Carriers*, the Texas Commission has the ultimate regulatory authority to approve or disapprove rates, (which includes by definition, regulations and services) to be offered by those in the telecommunications industry. The "active supervision" prong of the test is satisfied in the instant case just as it was in *Southern Motor Carriers*. There, the four collective-ratemaking statutes were "prior approval" statutes. Under them, (1) common carriers were required to submit rates for approval, (2) the rates became effective if the state agency took no action within a specified time period, and (3) if a hearing was scheduled, a rate became effective only after affirmative agency action. The Court determined that the state agencies "thus have and exercise ultimate control over all intrastate rates." (*Id.* at 51). The same is true for Texas' regulatory structure.

The Commission additionally has the power to require registration of telecommunications carriers and other providers (e.g., resellers) of telecommunications services and conduct investigations as are necessary to determine

the scope of competition in the telecommunications industry. PURA §18(c). The Commission has supervisory powers over the record keeping, accounting and reporting methods of public utilities. PURA §§27-28. In that respect, the Commission may conduct inspections and examine a public utility's records under oath, compel production of records and inquire into the management and affairs of public utilities. The Commission also controls the issuance of certificates of convenience and necessity which must be obtained by any public utility providing services in Texas. PURA §§49-62; *see Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 825 (9th Cir. 1982), *cert. den.*, 456 U.S. 1011 (1982) holding "active supervision" requirement satisfied, observing that administrative agency was under a duty to investigate racing permit applications which were subject to specified criteria.

All of the administrative decisions of the Commission are subject to the scrutiny of the Texas courts. PURA §69; *See Public Utility Commission of Texas v. AT&T Communications, Inc.*, 777 S.W. 2d 363 (Tex. 1989); *Texas Alarm & Signal Ass'n. v. PUC*, 603 S.W.2d 766 (Tex. App.-Austin 1985, no writ); *Amtel Communications, Inc. v. PUC*, 687 S.W.2d 95 (Tex. App.-3rd Dist. 1985, no writ). The *AT&T*, *Texas Alarm* and *Amtel* cases alone demonstrate that Texas *is* actively supervising this regulatory scheme. In *Amtel Communications, Inc.*, the court gave a painstaking, detailed analysis of the requirements of the regulatory scheme. While Petitioner quotes from the background discussion in *Amtel*, the court specifically noted: ". . . in some circumstances, discrimination may be in the public interest and there is, in such circumstances actually a public policy in favor of discriminatory practices by a public utility regulated under the statute, even with regard to basic utility services." *Amtel Communications, Inc. v. PUC*, 687 S.W.2d 95, 101 (Tex. App. 3rd Dist. 1985, no writ.) These cases

also demonstrate the Attorney General's involvement in the regulatory arena — again showing the state's active supervision over the regulatory structure. *See Monarch Entertainment Bureau, Inc. v. New Jersey Highway Authority,* 715 F. Supp. 1290 (D.N.J. 1989) aff'd without op. 893 F.2d 1331 (1989) (active supervision requirement satisfied where Highway Authority's actions subject to review by the governor). Under PURA, §71, if the Commission believes that a utility is not complying with PURA or any rule, regulation or order, the Attorney General shall bring an action on behalf of the Commission to enjoin the commencement or continuation of the Act.

The second prong of the *Midcal* test, that the state actively supervises telecommunications regulation activities, is satisfied.

The *Patrick, Duffy, Hallie* and *Cantor* cases cited by Petitioner in its Brief in support of its position that the state action doctrine are inapposite. In *Patrick v. Burget,* 486 U.S. 94 (1988) and *324 Liquor Corp. v. Duffy,* 479 U.S. 335 (1987), this Court held only that the second prong of the *Midcal* test was not satisfied because the states did not actively supervise the conduct in question, unlike the Commission's active supervision of Southwestern Bell's enforcement of its tariffs. In *Hallie v. Eau Claire,* 471 U.S. 34 (1985), superseded by statute as stated in *Sakamoto v. Duty Free Shoppers Ltd.,* 764 F.2d 703 (9th Cir. 1985), *cert. den.,* 475 U.S. 1081 (1986), this Court, discussed at length the two-part *Midcal* test, and held that the state action doctrine applied. Such holding supports Southwestern Bell's position in this case. Finally, in *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976), this Court determined that the state did not clearly and articulately express the questioned conduct as state policy in contrast to the instant case. Here the Commission has

the power to approve the tariffs submitted by a public utility if in the public interest, even if such tariffs work a disadvantage to a particularly situated customer. PURA, Sec. 16(a) provides:

> The commission has the general power to regulate and supervise the business of every public utility within its jurisdiction and to do all things, whether specifically designated in this Act or implied herein, necessary and convenient to the exercise of this power and jurisdiction. The commission shall make and enforce rules reasonably required in the exercise of its powers and jurisdiction, including rules governing practice and procedure before the commission. The commission may call and hold hearings, administer oaths, receive evidence at hearings, issue subpoenas to compel the attendance of witnesses and the production of papers and documents, and make findings of fact and decisions with respect to administering the provisions of this Act or the rules, orders, or other actions of the commission.

See also PURA, Sec. 71.

Again, on page 16 of its Petition, USM has mischaracterized the central issue in this dispute by citing Respondent's "threat to put Petitioner out of business." Petitioner can continue to operate its business if it orders Southwestern Bell services from the Access Service tariff. Petitioner cannot continue to operate its business by misusing and reselling Southwestern Bell's local exchange services in violation of its tariffs.

Petitioner should find it difficult to argue the Commission is not actively supervising Respondent's conduct. These parties have just concluded a three-week evidentiary hearing before the Commission in order to determine the following points:

1. Whether USM is in violation of the tariffs under which it is receiving service from Southwestern Bell,
2. Whether the relevant provisions of those tariffs are unreasonable or in any way in violation of any provision of law, within the meaning of PURA Section 42,
3. If the answer to the first two questions are in Southwestern Bell's favor, whether Southwestern Bell should be permitted to terminate USM's existing service under those tariff provisions pursuant to PUC Substantive Rule 23.46.

USM's arguments have been heard by the Commission and will be decided in that forum. Interim relief maintaining the status quo was ordered by the Commission two years ago pending the outcome of the complaint proceeding. While the Commission cannot order money damages, it can and will interpret the validity and application of the tariffs.

3. *THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL.*

The fundamental flaw in Petitioner's argument at pages 18-25 is that it ignores the fact that Texas *has* displaced competition as set forth in Section 2 of PURA. Respondent would agree with Petitioner's conclusion that *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) involved one isolated competitive area of the electricity industry, the supply of light bulbs.

However, in the present case the services at issue are the fundamental local exchange services that are the crux of regulation in Texas. These services are not a minor sideline for Respondent, or, as this Court characterized the light bulb exchange program in *Cantor*, ". . . a program that is primarily Respondent's, not the Commission's . . .". The circumstances in this case are widely divergent from those in

Cantor. In *Cantor,* this Court recognized the light bulb market as being essentially unregulated. That cannot be said of the services at issue herein.

Further, Petitioner is wrong when it states on page 21 of its brief that no decision has contradicted the holdings and reasoning in *Cantor. Southern Motor Carriers* expressly rejected certain premises of *Cantor* referring to the *Cantor* language setting forth the "necessity" requirement as "questionable dictum". *Southern Motor Carriers,* 471 U.S. at 517, n. 21. The Fifth Circuit folowed this limitation of *Cantor* in *Benton, Benton and Benton v. Louisiana Facilities Public Authority,* 897 F.2d 198 (5th Cir. 1990), *cert. den.* ___U.S.___, 111 S.Ct. 1619 (1991). The 10th Circuit has also followed *Southern Motor Carriers* rather than *Cantor* in *Lease Lights, Inc. v. Public Service Co. of Okla.,* 849 F.2d 1330, 1332 (10th Cir. 1988), *cert. den.,* 488 U.S. 1019 (1989) ("[Plaintiffs] ignore, however, that the Supreme Court has explicitly softened the previously stringent requirements for state action immunity." (citing *Southern Motor Carriers).*

The case upon which USM relies, regarding the filed tariff issue, *Essential Communications v. American Tel. & Tel. Co.,* 610 F.2d 1114 (3rd Cir. 1979), concerns the federal regulatory scheme and predates the controlling authority of *Southern Motors,* (1985) and *Midcal,* (1980).

Essential also keys on the fact Plaintiff was a competing equipment provider, not a customer. In the case at bar, USM is inappropriately using and reselling Southwestern Bell's regulated services in violation of its tariffs, whether as a customer or as a competitor. This circumstance would be comparable if *Essential* had been *reselling* AT&T's equipment, rather than using its own. In *Essential,* there was no active FCC approval of the tariff at issue.

A similar challenge was unsuccessfully raised by an equipment provider in Texas in *Amtel Communications v. PUC*, 687 S.W. 2d 95 (Tex. App. 3rd Dist. 1985, no writ). There, the equipment provider filed a complaint at the PUC against Southwestern Bell charging the combined effects of Southwestern Bell's tariff charges and certain business policies were discriminatory and anticompetitive. (*Id.* at 97). The PUC denied Amtel's claims and Amtel sued for review according to PURA §69. The Court upheld the PUC after a detailed analysis of PURA and the competing considerations the PUC must take into account in rendering a decision. The Court stated:

> [T]he antidiscrimination and antitrust criteria of PURA §§38, 45 & 47 are not absolute. The Commission is allowed discretion and judgment in such matters for it is also required under the statute to implement the contraries of these public policies . . .

(*Id.* at 109).

This Texas Court's evaluation of PURA in *Amtel* is more instructive to this Court on the issue of discrimination than is the treatment accorded an equipment provider under a different regulatory scheme in *Essential*.

The Texas Supreme Court affirmed the PUC's balancing of competitive and other regulatory considerations in *Public Utility Commission of Texas v. AT&T Communications, Inc.*, 777 S.W. 2d 363 (Tex. 1989). It cannot be argued that the PUC does not or cannot take into account the competitive impact of Southwestern Bell's actions as a regulated utility. In *Public Utility Commission of Texas v. AT&T Communications, Inc.*, the Court noted:

> The hearing examiner's report in both cases expressly stated the interexchange carriers failed to prove that the proposed access charge system placed them at a competitive disadvantage, and the Commission adopted these findings.

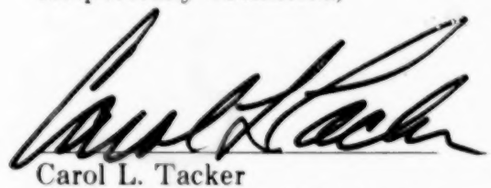
(*Id.* at 366).

In the present case, more than tariff filings are at issue. Also at issue is the Commission's authority under PURA to establish terms and conditions (as included in the term "rate") and to resolve disputes concerning the force and applicability of tariffs in complaint proceedings, such as the hearing these parties concluded on February 17, 1992.

CONCLUSION

The decision by the Fifth Circuit is appropriate and does not conflict with decisions of Courts of Appeal or of this Court on the essential issue of immunity. For the reasons stated in this Response, Southwestern Bell prays the Court deny the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the Respondent's Brief In Opposition to the Petition for Writ of Certiorari were personally served upon the attorney for Petitioner, U.S. Metroline Services, Inc., 1100 St. Paul's Place, 750 N. St. Paul St., Dallas, Texas 75201, by courier, on this 4 day of March, 1992.

Carol L. Tacker